UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

LANTZ ELECTRIC, INC.

Employer

and

ROBIN FERREN, an Individual

Petitioner

and Case 36-RD-1559

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION
NUMBER 659, AFL-CIO

Union

and Case 36-RD-1560

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION
NUMBER 280, AFL-CIO

Union

and Case 36-RD-1561

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION
NUMBER 932, AFL-CIO

Union

and Case 36-RD-1562

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL UNION
NUMBER 48, AFL-CIO

Union[1]

[1] The names of all four Unions appear as corrected at hearing.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute units appropriate for the purpose of collective bargaining[2] within the meaning of Section 9(b) of the Act:

> **Unit A (36-RD-1559):** All apprentice and journeymen electricians employed by the Employer who perform work within the geographical jurisdiction of International Brotherhood of Electrical Workers, Local 659, AFL-CIO; but excluding material handlers, guards and supervisors as defined in the Act and all other employees.
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> **Unit B (36-RD-1560):** All apprentice and journeymen electricians employed by the Employer who perform work within the geographical jurisdiction of International Brotherhood of Electrical Workers, Local 280, AFL-CIO; but excluding material handlers, guards and supervisors as defined in the Act and all other employees.
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> **Unit C (36-RD-1561):** All apprentice and journeymen electricians employed by the Employer who perform work within the geographical jurisdiction of International Brotherhood of Electrical Workers, Local 932, AFL-CIO; but excluding material handlers, guards and supervisors as defined in the Act and all other employees.
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> **Unit D (36-RD-1562):** All apprentice and journeymen electricians employed by the Employer who perform work within the geographical jurisdiction of International Brotherhood of Electrical Workers, Local 48, AFL-CIO; but excluding material handlers, guards and supervisors as defined in the Act and all other employees.

The Employer is an electrical contractor with a principal place of business in Springfield, Oregon. Since 1992, the Employer has been signatory to a letter of assent binding it to the collective bargaining

[2] In accordance with the parties' post-hearing stipulation approved on December 21, 1999, and hereby admitted to the record as Board Exhibit number 2.

agreement between the National Electrical Contractor's Association (NECA) and Local 280. The Employer has also signed similar letters of assent with Local 659 (1993); Local 48 (1995); and Local 932 (1996 and 1998). Herein, the Unions contend that Petitioner is not an employee within the meaning of the Act[3] Further, the Unions contend that with respect to the current contracts between the Employer and the Unions constitute a bar to an election.

As noted above, the parties entered into a post-hearing stipulation with respect to the appropriate units. At the time of the hearing, there were two journeymen, including Petitioner and Tom DeShazer, and one apprentice, Wayne Hense, employed. The Employer also employs others in non-Unit(s) classifications.

The Status of Petitioner.

Petitioner has been employed as a journeyman electrician ever since the Employer opened for business in 1992. The Employer is a corporation, and Tim Lantz is the president and sole stockholder of the corporation. The Employer's customers, who are public entities such as the State of Oregon, require that the Employer be bonded. The bonding companies require the signatures of the president and secretary of the corporation. At the time the Employer commenced business, the bonding companies preferred (or required) that the president and secretary be different individuals. Lantz therefore appointed Petitioner to be secretary of the corporation. Over the years, the Employer has been able to establish with the bonding companies a reputation for reliability such that it is no longer necessary for the president and secretary of the corporation to be different persons. Further, Lantz had found it inconvenient to have to go to jobsites to obtain Petitioner's signature on documents. Therefore, Lantz made a change in the officers of the corporation, and now Lantz is both president and secretary. Petitioner now has the title of vice president. The Employer's corporate by-laws make no specific provision for a vice president. The by-laws provide for a corporate board of directors, but the record does not reveal the number or identity of such directors. There is in evidence a document dated March 30, 1998,[4] memorializing the designation of Lantz as corporate secretary and Petitioner as vice president. Such documents state that a meeting was held between the two of them and they unanimously voted on the changes. However, the document does not state that such meeting was a meeting of the corporate board of directors. There is no contention or evidence that Petitioner is a member of the corporate board of directors.

As corporate secretary, Petitioner had no duties, responsibilities, or authorities other than signing bonding documents from time to time. As vice president, he has no duties, responsibilities, or authority at all.[5] He is paid the wage rate for foremen, and has been so paid since the beginning of his employment with the Employer. Over the years, other employees have also been paid the foreman's wage rate. Employees who are paid the foreman's rate are not necessarily employed as foreman. The labor agreement permits an employer to request an individual on the out-of-work list by name if the employer agrees to pay that person the foreman's rate for at least one year. On that basis, Petitioner has been paid

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[3] At hearing, the Unions offered a motion that the petitions herein be dismissed on that basis. Such motion is hereby denied for the reasons set forth elsewhere herein.

[4] Lantz testified that he thought the event described in the document occurred in 1999.

[5] With respect to Petitioner's title as vice president, Lantz testified, "I just picked the title of vice-president, I guess, because a lot of companies I bid with -- or deal with, every person that works here has got a business card that says "vice-president," so I don't know really what it means. I don't think it's a legal title, per se, as far as an office or -- I don't know if it is or not." Petitioner, when asked the significance of his title said, "Probably about the same as the vice-president of the United States. Tim's got to die, and then I'm not sure what I would do then. I mean, what does Al do?"

the foreman's rate since he was hired. Petitioner does not hire or fire employees, or make any such recommendations, nor does he have any other supervisory authority as specified in Section 2(11) of the Act. Tim Lantz testified without contradiction that he alone exercises supervisory authority, and, further, that he alone determines all Employer policy.

Petitioner receives no benefits not offered to other employees. Nor is Petitioner given any special treatment by Lantz. On jobs where Petitioner is the foreman, he is responsible for making sure that all needed materials are available at the jobsite, and to this end may order materials on the Employer's account from electrical wholesalers. In addition, he lays out the work according to the blueprints provided to him, and gives other employees such directions as which size conduit to use, or how deep to dig a ditch. No party contends that Petitioner is a statutory supervisor or a managerial employee as defined by the Board. See *NLRB v. Bell Aerospace Company*, 416 U.S. 267 (1974). It is clear that the type of direction he gives other employees is that typical of a more experienced employee leading other employees and does not rise to the level of supervisory responsible direction. *Electrical Specialties, Inc.,* 323 NLRB 705 (1997).

Tim Lantz testified that he is the sole stockholder in the corporation. Nevertheless, the Unions contend that Petitioner has an ownership interest in the Employer. The Unions require that all rank-and-file members pay "market recovery dues," otherwise unexplained in the record.[6] Members who are owners of companies have the option of not paying such dues. The Unions offered into evidence a document dated March 14, 1993, and signed by Tim Lantz, Petitioner, and a third person not involved herein,[7] stating that, "At this time, we do not choose to participate in the Market Recovery Plan." The Unions argue that since only owners have the option to decline to participate, and Petitioner signed the letter declining to participate, Petitioner must therefore be an owner. The Unions offered no other evidence that Petitioner has any ownership interest in the Employer.[8]

In considering whether an individual employee is so aligned with management as to lack a community of interest with other employees, the Board looks to whether such employee enjoys additional benefits or privileges, or participates in management and/or labor policy formulation. *Science Applications International Corporation*, 309 NLRB 373 (19992) and cases cited therein; *Airport Distributors*, 280 NLRB 1144 (1986); *Upper Great Lakes Pilots*, 311 NLRB 131 (1993); *Vincent M. Ippolito*, 313 NLRB 715 (1994). Here, the Unions have failed to establish that Petitioner has any ownership interest in the Employer.[9] Further, there is uncontroverted evidence in the record that all supervisory and managerial authority resides with Tim Lantz. It is clear that Petitioner's designation in the past as secretary of the corporation had no substantive significance except with respect to the Employer's applications for bonding, and that Petitioner's current designation as "vice president" is merely honorary and has no substantive significance at all. Petitioner plays no role in formulating corporate policy.

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[6] I take administrative notice that market recovery dues in the Northwest are funds passed from IBEW-represented employees, to the IBEW to be used to assist signatory contractors to bid competitively against non-union contractors for certain electrical work.

[7] Kevin Ladd, a former employee.

[8] It does appear that Petitioner has been treated as part of the Unit(s) at all material times.

[9] The Unions' evidence with respect to the market recovery dues matter is insufficient to establish that Petitioner has any ownership interest in the Employer, inasmuch as it relies on the inherently unreliable presumption that it would be impossible for anyone other than a person with ownership interest to sign a document such as the March 14, 1993 letter in evidence.

There is no requirement that an RD Petitioner be a unit member, only that he not be a statutory supervisor or perhaps a related agent of the Employer. Clearly, there is no evidence that Petitioner falls into such category, other than his puffy, but meaningless, title. Accordingly, he is eligible to petition for an RD election.

Further, I conclude that Petitioner is an employee within the meaning of the Act and is included in the Unit(s).

Contract bar issue.

The letters of assent signed by the Employer uniformly provide that the Employer will comply with and be bound by the current and subsequent labor agreements between the relevant local union and NECA. The current collective bargaining agreement for Local 280 has a term of January 1, 1999, through December 31, 1999. The agreement for Local 48 has a term of January 1, 1999, through December 31, 2003. The agreement for Local 932 has a term of January 1, 1999, through December 31, 2001. The agreement for Local 659 has a term of January 1, 1998 through December 31, 1999. The petitions herein were filed on November 15, 1999.

There is no contention or evidence that any of the collective bargaining agreements involved herein were other than 8(f) agreements at the time they were signed. The Unions herein contend that they currently enjoy a 9(a) relationship with the Employer on the basis of a valid card majority. The letters of assent signed by the Employer state, in pertinent part:

> The Employer agrees that if a majority of its employees authorize the Local Union to represent them in collective bargaining, the Employer will recognize the Local Union as the NLRA Section 9(a) collective bargaining agent for all employees performing electrical construction work within the jurisdiction of the Local Union on all present and future jobsites.

On November, 16, 1999, the day *after* the instant petitions were filed, Local 280 sent the Employer a letter requesting recognition as the Section 9(a) representative, on the basis of authorization cards. Copies of five authorization cards were attached to the letter, each designating Local 280 as the collective bargaining representative. The cards were signed and dated as follows: by Robin Ferren (Petitioner, herein) on August 4, 1987; by Chris Goetz on July 27, 1992; by Dennis _____(last name illegible), date illegible; by Thomas DeShazer on October 19, 1999; and by Wayne Hense on June 18, 1997. Lantz testified that in addition to those five individuals, the only other employee he had had in the past 24 months was Earl Starr. By letter dated November 19, 1999, the Employer, through its attorney, declined to recognize Local 280 as the Section 9(a) representative. There is no record evidence that any of the other three Locals involved herein has made any similar request for 9(a) recognition.[10]

Section 8(f) of the Act reads as follows:

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[10] The hearing officer properly rejected a November 18, 1999, letter to the Employer from Local 932, requesting 9(a) recognition, inasmuch as the Unions offered no witness able to authenticate the document, and Tim Lantz testified that he had never seen it before. The letter is in the Rejected Exhibit file. I note that, unlike the similar letter sent to the Employer by Local 280 and in evidence herein, Local 932's letter is not accompanied by any proof of service (i.e., a postal service return receipt), nor, more importantly, is it accompanied by copies of authorization cards.

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

In *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board established certain principles to be followed with respect to Section 8(f): "(1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship." In *Deklewa*, at fn. 41, the Board specifically stated that, "we will require the party asserting the existence of a 9(a) relationship to prove it." A union may prove the existence of a 9(a) relationship by prevailing in a Board-conducted election or by being recognized on the basis of a showing of majority support. *Brannan Sand and Gravel Co.,* 289 NLRB 977 (1988).

The standards by which a construction industry union can prove that a construction industry employer has voluntarily recognized the union as a 9(a) majority representative was summarized by the Board in *Golden West Electric*, 307 NLRB 1494 (1992):

> [A] union can establish voluntary recognition by showing its express demand for, and an employer's voluntary grant of, recognition to the union as bargaining representative based on a contemporaneous showing of union support among a majority of employees in an appropriate unit. *Brannan Sand & Gravel Co.,* 289 NLRB 977, 979-980 (1988); *American Thoro-Clean,* 283 NLRB 1107, 1108-1109 (1987). Further in *J & R Tile*, 291 NLRB 1034, 1036 (1988), the Board held that, to establish voluntary recognition there must be positive evidence that a union unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such. (307 NLRB at 1495.)

In *Goodless Electric Co.,* 321 NLRB 64 (1996), the employer had signed a letter of assent which included the same language as that found herein. The Board found that the employer's execution of the letter of assent containing this language "bound it to recognize the Union as a 9(a) representative, *subject*

only to the condition that the Union prove its majority support at some point prior to the letter of assent's expiration." [Emphasis added.]

Thus, in accordance with *Goodless*, to gain 9(a) status, the Locals here had only to produce a contemporaneous showing of union support among a majority of the Employer's employees. However, they failed to do so at any time prior to the filing of the instant petition. Indeed, only Local 280 has established in the record that it ever proffered proof of majority status, and such proffer was not made until after the instant petitions had been filed. This circumstance is analogous to a contract which has been agreed upon by the parties but has not yet been signed before the filing of a petition. The Board has long held that such a contract does not bar the petition. *Appalachian Shale Products*, 121 NLRB 1160 (1958). Here, the event which would create a 9(a) relationship and thus a contract – that is, bar, the express demand for 9(a) recognition accompanied by a showing of majority support - had not occurred by the time the petition was filed. Thus, even ignoring the staleness of the cards, at the time the petition was filed, the relevant collective bargaining agreement was an 8(f) agreement not constituting a bar to an election, with respect to Local 280. As to Locals 48, 659, and 932, there is no record evidence that any of them ever proffered to the Employer any showing of majority support, and their contracts with the Employer have continued to be 8(f) agreements.[11]

I conclude, therefore, that the Unions have failed to establish on this record that they are the 9(a) representative of the unit employees and that there is no contract bar to the conduct of an election herein.

There are at most approximately 6 eligible employees in each unit. The record does not reflect whether any employees meet the eligibility formula below, as to several of the units. The record does not reflect whether any work is available, either immediately, or as a result of an awarded bid, or even a pending bid, as to several of the units.

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the units who were employed during the payroll period ending immediately preceding the date of this Decision including employees who did not work during that period because they were ill, on vacation, or *temporarily*[12] laid off, and those in the respective units who have been employed for 30 working days or more within the 12 months preceding the eligibility date for the election, or had some employment during those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date.[13] Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who quit voluntarily or were discharged for cause prior to

[11] A contract in the construction industry is deemed to be an 8(f) agreement unless the party claiming that a 9(a) relationship exists has affirmatively proven such existence. *Deklewa*, supra, at fn. 41; *J.R. Tile*, 291 NLRB 1034 (1988).

[12] The parties are reminded that temporarily laid off employees who do not meet the eligibility minimums but are otherwise eligible, are not eligible to vote unless they have at least a reasonable expectation of recall in the foreseeable future.

[13] There are four units herein. Eligibility is to be determined separately for each unit depending on the employment in the individual unit.

the completion of the last job for which they were employed, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by (Unit A) INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NUMBER 659; by (Unit B) INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NUMBER 280; by (Unit C) INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NUMBER 932; by (Unit D) INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NUMBER 48.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

LISTS OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access lists of voters in each individual unit and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 4 copies of election eligibility lists, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Officer-in-Charge who shall make the list available to all parties to the election. In order to be timely filed, such lists must be received in the Portland Subregional Office, Koin Center, Room 401, 222 S.W. Columbia Street, Portland, Oregon 97201-5878, on or before December 30, 1999. No extension of time to file these lists shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive

Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by January 6, 2000.

DATED at Seattle, Washington, this 23rd day of December, 1999.

/s/ PAUL EGGERT

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